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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No.....

HARVEY DeWATERS,
Petitioner,

vs.

MACKLIN COMPANY,
a Michigan Corporation

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Harvey DeWaters, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered in the above case on April 26, 1948.

OPINIONS BELOW

The findings of fact, and conclusions of law, of the District Court (R. 94-99) are reported in 69 Fed. 262, 6 W. H. Cases 776.

The opinion of the Circuit Court of Appeals (R. ...) is reported at 167 Fed. 2d. 694 and 7 W. H. Cases 925.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 26, 1948 (R. ...). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Under respondent's "Production Savings Plan," its total monthly wage is a fixed percentage (from 19% to 24% during the period involved in this suit) of an assigned "production value" of each unit produced. The rate per unit thus paid is the same without regard to whether the work is performed during straight time or overtime hours. Guaranteed hourly rates are advanced to the employees with time and one half for overtime. The difference between such sum total of unit rates and the hourly rates previously advanced is then allocated to individual employees on the basis of the amount previously advanced to them on hourly rates. The question presented is whether such method of compensation may be deemed to include overtime payments in accordance with Section 7 of the Act.

STATUTE INVOLVED

The pertinent provisions of Fair Labor Standards Act of 1938 (52 Stat. 1060) 29 U. S. C. (Sec. 201-219) are as follows:

> "Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
>
> (2) for a workweek longer than forty-two hours during the second year from such date, or
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date,
>
> unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."
>
> "Sec. 16. (b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages."

STATEMENT

The instant cause was instituted by petitioner and 390 other plaintiffs, who constituted practically all[1] of the production employees of the Macklin Company, defendant. They were employed in the manufacture of grinding wheels and other abrasive products in defendant's plant in Jackson, Michigan.

During the trial in the court below when the record was complete as to all the plaintiffs except that only the wage records of Harvey DeWaters had been placed in evidence, the respondent upon the court's suggestion moved for a separate trial as to Harvey DeWaters which motion was granted by the court over the objection of plaintiff's attorneys (R. 50). The judgment of the District Court and the subsequent proceedings herein apply only to DeWaters. The final decision herein will, however, control the determination as to the remaining plaintiffs.

The respondents' "Production Savings Plan" was instituted in the fall of 1938, about the time of the effective date of the Act (R. 53-54). The effect of this plan has been to fix the employer's wage costs at a predetermined amount for each unit of production regardless of the number of hours worked by employees. There is no dispute between the parties as to the operation of the plan. The plan operates in the following manner: Each item produced is given a "production value" which is appellee's list price of the item minus the "trade discount" (R. 96-98). The list prices and trade discounts have been unchanged since 1937, so that the "production value" of each item has been unchanged since that date (R. 97-98).

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[1] During the period involved, defendant employed approximately 400 production employees (51).

For example, a silicate carbon vitrified wheel, which is listed at $10.25, has been assigned a "production value" of $3.90 (R. 97-98). Other products have different list prices and "production values" (R. 98). At the end of each month, a fixed percentage of the total "production value" of the items produced during that month is set aside (R. 98-99). At the time of trial the employees are allotted 24 percent of the "production value" (R. 56).[2] Thus for each silicate carbon wheel produced, appellee pays in wages $0.936 (24 percent of $3.90) (R. 98-99). The manner of dividing the sum total of such unit or piece rates among the employees is illustrated in Exhibit 1 (R. 174-175).

This Exhibit 1 shows the operation of the Production Savings Plan in January 1945. Reduced to round numbers, the total "production value" in that month was $470,000. Thus $112,800 (24 percent of $470.00) was the total wage cost. Since appellee had already advanced $97,700 in weekly wage payments during that month, it made an additional payment of $15,100 under the Production Savings Plan. The additional payment ($15,100) was 15½ percent of wages already advanced ($97,700). Hence each employee received an additional sum equal to 15½ percent of the wages previously advanced to him (R. 174-175).

Employees under the plan receive a wage payment each week based on an hourly rate of pay, and time and one-half that rate for the time worked in excess of 40 hours (R. 101, 109). Since 1942, for the great majority of employees, these wage advances have been based on an

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[2] When the plan was inaugurated the employees were allotted 19 percent of "production value," and the percentage has been increased from time to time (R. 103).

hourly rate of 90 cents (R. 43, 101).[3] Each month the excess of the fixed percentage of "production value" over the amounts advanced at hourly rates is allocated to employees in proportion to the amounts previously advanced (R. 54). In every month since June 1939, the share of "production value" allotted to wage costs, or in other words the sum total of the unit rates, has exceeded the wages advanced at the assigned hourly rate (R. 119, 111). Thus, except for two months early in 1939, the wage advances have been of no significance in determining appellee's total wage payments since under appellee's plan the wages thus advanced had to be increased in an amount necessary to make the total monthly wage bill equal the predetermined percentage of "production value" (R. 119, 111).

The percentage by which the total amount due under the piece rates or fixed percentage of "production value" exceed the guaranteed hourly rates for each month from the inception of the plan until the institution of suit are set forth in the record on page 119 and average 15.57%.

Petitioner contends that he has not been paid any overtime compensation whatsoever, because the defendant's wage payment plan is actually a group piece rate plan under which the total wage payments per unit of production are the same regardless of whether or not overtime hours are worked, and that his regular rate can only be determined by dividing his total compensation per week by the number of hours worked per week.

Respondent's contention is stated in the opinion of the Circuit Court of Appeals (R. ...) as follows:

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[3] Beginners, custodial employees, and female employees receive a lower rate; night shift and a few maintenance workers receive 95 cents (R. 53).

> "Appellee contends that the 'regular rate' at which the employee was employed was the regular contract rate of 90 cents per hour plus that portion of the production savings, which was allocated under the plan to straight time compensation * * *"

Both the District Court and the Circuit Court of Appeals adopted respondents' view. A brief was filed and oral argument made before the Circuit Court of Appeals for the Administrator of the Wage and Hour Division, United States Department of Labor, as *amicus curiae*, who supported petitioner's position herein.[4]

REASONS FOR GRANTING THE WRIT

Respondent's plan, like many of the plans which have been held invalid because inconsistent with the overtime provisions of the Act, appears superficially to provide for the requisite overtime compensation. In analyzing such plans where there is a semblance of compliance and the deficiencies are not readily apparent, it is helpful and, we think, particularly important to an understanding of the operation and effect of the plan, to review and have clearly in mind the basic aims of the overtime provisions of the Act. In one of the first cases involving the overtime provisions to reach this Court, *Overnight Motor Co. v. Missel*, 316 U. S. 572, this Court expressed its agreement with the statement of the circuit court of appeals that "one of the fundamental purposes of the Act was to induce work-sharing and relieve unemployment *by reducing hours of work*" [italics supplied] 316 U. S. at 577. To attain this end, said the Court, "although overtime

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[4] Since the brief *amicus* concisely sets forth the arguments in opposition to the validity of respondent's plan we have adopted such brief to a large extent herein.

was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage • • •. Reduction of hours was a part of the plan from the beginning." 316 U. S. at 578.

This Court has repeatedly stated that one of the basic purposes of the Act was to reduce hours of work *"by placing financial pressure on the employer." (Walling v. Helmerich & Payne,* 323 U. S. 37 at 40 [italics supplied]), that the intent was to accomplish the statutory purpose *"by increasing the employer's labor costs by 50%* at the end of the 40-hour week"*(Walling v. Youngerman-Reynolds Hardwood Co.,* 325 U. S. 419 at 423 [italics supplied]), that *"A full 50% increase in labor costs* and a full 50% wage premium • • • were meant to flow from the operation" of the overtime provisions *(Walling v. Harnischfeger Corp.,* 325 U. S. 427 at 431 [italics supplied]). The Court has held that plans which allow the employer "to escape completely the burden of a 50% premium for the [overtime] hours" *(Youngerman-Reynolds Hardwood Co.,* 325 U. S. at 426), or which make "A full 50% increase in labor costs [for overtime] • • • impossible of achievement" *(Harnischfeger Corp.,* 325 U. S. at 431) cannot be sanctioned.[5] Since under respondent's plan, as we shall show, its wage costs remain constant whether it works 10 employees for 60 hours or 15 employees for 40 hours, the legislative intent is "impossible of achievement" under respondent's wage plan.

We submit that in practical effect the "Production Savings Plan" is a system of piece rate compensation, sub-

[5] *Cf. Walling v. A. H. Belo Corp.,* 316 U. S. 624, and *Walling v. Halliburton Oil Well Cementing Co.,* 331 U. S. 17, which, although apparently constituting exceptions to the general rule laid down in the cases cited above, are inapplicable here where there is "no provision for a guaranteed weekly wage." *147 Madison Ave. Corp. v. Asselta,* 331 U. S. 199, 209.

stantially the same as those presented to this Court in *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, and *Walling v. Harnischfeger Corp.*, 325 U. S. 427. In both of these cases, notwithstanding the contractual provision for hourly rates of pay, the piece rate was held to be the actual measure of compensation so that the failure of the plans to provide for overtime compensation on the piece rate earnings was held to constitute a violation of the overtime requirements of the Act. We submit further that compliance with the Act cannot be attained by retroactively allocating the piece rate payments, which are constant for both straight-time and overtime hours, into straight-time and overtime segments at the end of each month. See *Walling v. Halliburton Oil Well Cementing Co.*, 331 U. S. 17, 24-25.

1. *The Production Savings Plan is the equivalent of a piece rate system of compensation.* Despite the somewhat complicated provisions of the plan, the so-called bonus features in actual fact do no more than establish a group piece rate for appellee's employees. To use the example which appears in the record, the employment agreement is the same as though it provided that the employees as a group shall receive $.936 for each silicate carbon wheel produced. The legal effect of employing a piece rate cannot be changed by describing the arithmetical method by which the piece rate is determined rather than directly setting the rate itself. Instead of simply providing that the employees as a group shall be paid $.936 for each silicate carbon wheel, the plan provides that they shall receive 24 percent of "production value," listed by appellee at $3.90, which equals $.936. The total pay roll at the end of each month is 24 percent of total "production value" or the component of various piece rates.

Similarly, the description of the plan in terms of a "bonus" to be paid in addition to stated hourly rates does not alter its piece rate character. *Walling v. Harnischfeger Corp.*, 325 U. S. 427. In the *Harnischfeger* case this Court described a comparable wage agreement as one under which employees "are each paid a basic hourly rate plus an 'incentive bonus' or 'piecework earnings.'" 325 U. S. at 428. In that case employees received an agreed hourly rate for the time necessary to perform a given job and the difference between these earnings and a so-called job price as an "incentive bonus." The Court regarded employees paid in this manner as "in fact paid entirely on a piecework basis with a minimum hourly guaranty." 325 U. S. at 431.[6] The *Harnischfeger* case involved piece rates applicable to a group basis, as here, and also piece rates which applied to the work of individual employees. The Court's opinion, which makes no reference to these different situations apparently considered the principle of the decision equally applicable to each.[7] Thus in all essential respects appellee's compensation plan is directly comparable to the plan reviewed by the Court in the *Harnischfeger* case. It follows, therefore, as the Court there held that "When employees do earn more than the basic hourly rates because of the operation of the incentive bonus plan the

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[6] The fact that in a few instances compensation at the agreed hourly rates exceeded the job price or piecework earnings was not considered significant in determining the actual basis of compensation when the piece rate controlled. 325 U. S. at 432. Cf. the two months in 1939 in the instant case (R. 119).

[7] Although the Supreme Court's opinion does not advert to the job prices fixed for groups of employees, this situation was specifically before the Court and it can hardly be doubted was within the purview of its decision. The employer's brief contains the statement that 98 percent of the "jobs" upon which prices were placed were assigned to groups of individuals, rather than to individuals. The operation of the plan with respect to group projects is illustrated in Defendant's Exhibit A, page 80, of the record in the Supreme Court.

basic rates lose their significance in determining the actual rate of compensation." 325 U. S. at 432.

The lack of significance of the stated hourly rates is perhaps even more marked in the instant case than in *Harnischfeger*. In that case the employees working on a project were sometimes assigned different hourly rates of pay. In the instant case, however, virtually all employees receive the same rate, namely 90 cents per hour. Since the only effect of the hourly rate, with negligible exceptions, is to determine the employee's share in the group piece rate earnings, the compensation actually received by employees would be the same whether the hourly rate was fixed at 40 cents or $1.10 instead of 90 cents. This is illustrated in the footnote.[8] Thus, as long as

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[8] Assume that in 100 man-hours the plant produces $641.67 worth of wheels, so that the employees' share (24 percent) is $154.

(1) Employees A & B work 50 hours. Each is advanced $0.90 for 40 hours+$1.35 for 10 hours, or $49.50. Balance to be distributed, $154—$99=$55. Each receives ½ of $55 or $27.50. $27.50+$49.50=$77, total wage to each.

If the rate were 40 cents, each would be advanced 40 hours @ $0.40+10 hours @ $0.60 or $22.00. Balance to be distributed $154—$44 =$110. Each would receive ½ of $110 or $55. $55+$22=$77, total wage to each.

If the rate were $1.10, each would be advanced 40 hours @ $1.10+ 10 hours @ $1.65 or $60.50. Balance to be distributed, $154—$121= $33. Each could receive ½ of $33 or $16.50. $16.50+$60.50=$77, total wage to each.

(2) Employee A works 40 hours, B works 60 hours. A is advanced $0.90 for 40 hours or $36.00, B is advanced $0.90 for 40 hours+$1.35 for 20 hours or $63.00. Balance to be distributed, $154—$99=$55. A receives 36/99 of $55.00 or $20; B receives 63/99 of $55 or $35. A's total wage is $36+$20=56; B's total wage is $63+$35=$98.

If the rate were 40 cents, A would be advanced 40 hours @ $.0.40=$16. B would be advanced 40 hours @ $0.40+20 hours @ $0.60=$28. Balance to be distributed, $154—$44=$110. A would receive 16/44 of $110 or $40; B would receive 28/44 of $110 or $70. A's total wage would be $16+$40=$56; B's total wage $28+$70=$98.

If the rate were $1.10, A would be advanced $44 for 40 hours, B would be advanced 40 hours @ $1.10+20 hours @ $1.65=$77. Balance to be distributed $154—$121=$33. A would receive 44/121 of $33 or $12. B would receive 77/121 of $33 or $21. A's total wage would be $44+ $12=$56; B's total wage $77+$21=$98.

compensation at the hourly rate does not exceed the piece rate, any figure could be fixed as the hourly rate without changing the employee's pay. In these circumstances it can hardly be doubted that the piece rates and not the stated hourly rate determine the pay which the employees receive. The conclusion seems inevitable, therefore, as the Supreme Court held in *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 425, that since the piece rate "accurately mirrors all payments that they [the employees] normally will receive from the respondent [the employer] during the workweek," it furnishes the basis of "the average regular rate at which the [employees] are employed" and "such a rate is the one that must enter into any calculations of overtime payments due under § 7 (a)." "The conclusion that only the minimum hourly rate constitutes the regular rate opens an easy path for evading the plain design of § 7 (a)." *Walling v. Harnischfeger Corp., supra,* at 431-432.

2. *The allocation retroactively of piece rate compensation to straight time and overtime does not constitute compliance with the Act.* If the employees "received only piece work wages it is indisputable that the regular rate would be the equivalent of the translation of those wages into an hourly rate. *United States v. Rosenwasser,* 323 U. S. 360." *Walling v. Harnischfeger Corp.,* 325 U. S. 427, 431. The regular rate is also the average of piece rate payments when the latter are superimposed upon agreed hourly rates as a guarantee or a bonus. *Walling v. Youngerman-Reynolds Hardwood Co.,* 325 U. S. 419; *Walling v. Harnischfeger Corp., supra.* Consequently, under these decisions, the failure to pay overtime compensation based upon the average piece rate earnings was held to constitute a violation of Section 7. The principle of these decisions applies in the instant case to render respondent's compensation plan invalid because of its

failure to provide for overtime compensation in addition to the piece rate earnings. The only feature of the instant plan which presents a problem different from those disposed of by the Supreme Court in the *Harnischfeger* and *Youngerman-Reynolds* cases *supra*, is the provision that the piece rate compensation shall be apportioned to straight-time and overtime hours so that the amount allocated to overtime equals pay at time and one-half the rate of the amount allocated to straight time.

Under the decisions of this Court and numerous circuit courts of appeals such an attempted allocation to straight time and overtime of a constant rate of pay, which is in fact the same rate for overtime hours as for straight-time hours, defeats the statutory overtime purposes and does not constitute compliance with the overtime requirements of the Act. *Walling v. Helmerich & Payne*, 323 U. S. 37; *149 Madison Ave. Corp. v. Asselta*, 331 U. S. 199; *Castle v. Walling*, 153 F. (2d) 923 (C. C. A. 5); *Watkins v. Hudson Coal Co.*, 151 F. (2d) 311 (C. C. A. 3); certiorari denied 327 U. S. 777; *Seneca Coal & Coke Co. v. Lofton*, 136 F. (2d) 359 (C. C. A. 10), certiorari denied 320 U. S. 772; *Patsy Oil & Gas Co. v. Roberts*, 132 F. (2d) 826 (C. C. A. 10); *Walling v. Helmerich & Payne*, 138 F. (2d) 705 (C. C. A. 10); cf. *Asselta v. 149 Madison Ave. Corp.*, 156 F. (2d) 139 (C. C. A. 2); *Walling v. Green Head Bit & Supply Co.*, 138 F. (2d) 453 (C. C. A. 10); *Walling v. Alaska-Pacific Consolidated Mining Co.*, 152 F. (2d) 812 (C. C. A. 9), certiorari denied 327 U. S. 803. The application of these holdings to the instant case renders the allocation formula invalid and compels the conclusion that the plan fails to satisfy the statutory requirements.

As pointed out above a basic purpose of the overtime requirement of the Act was "to spread employment by placing financial pressure on the employer" *(Walling v.*

Helmerich & Payne, 323 U. S. 37, 40) "by increasing the employer's labor costs by 50 per cent at the end of the 40-hour week." *Walling v. Youngerman-Reynolds Hardwood Co.,* 325 U. S. 419, 423. See also *Walling v. Harnischfeger Corp.,* 325 U. S. 427, 431; *Overnight Motor Co. v. Missel,* 316 U. S. 572, 578; *Walling v. Wall Wire Products Co.,* 161 F. (2d) 470 (C. C. A. 6); *Bumpus v. Continental Baking Co.,* 124 F. (2d) 549, 551, 552 (C. C. A. 6), certiorari denied 316 U. S. 704. If compensation is fixed by a rate of pay which is the same for straight-time and overtime hours, any subsequent allocation of that compensation into so-called "straight-time" and "overtime" segments allows the employer to escape completely the burden of a 50 percent premium" for overtime hours. *Youngerman-Reynolds* case, 325 U. S. at 426.

It is for this reason that the courts have consistently frowned upon attempts to treat constant rates of pay as embracing both straight time and overtime. The regular rate for the purpose of computing overtime under the Act is "the hourly rate actually paid for the normal non-overtime workweek" regardless of contractual attempts to designate a different rate. *Walling v. Helmerich & Payne,* 323 U. S. 37; *United States v. Rosenwasser,* 323 U. S. 360; *Walling v. Youngerman-Reynolds Hardwood Co.,* 325 U. S. 419, 424; *Walling v. Harnischfeger Corp.,* 325 U. S. 427; *149 Madison Ave. Corp. v. Asselta,* 331 U. S. 199. Thus attempts to designate as the "regular rate" a rate lower than that "actually paid," so that the total compensation will appear to include overtime compensation have been consistently condemned by the courts. This has been true where the attempted designation of the lower rate has been by an allocation device as well as by other means. In *Walling v. Helmerich & Payne, supra,* the Supreme Court held that an employer

who paid his employees a daily wage could not agree with his employees that the daily wage was allocated into straight-time and overtime segments because the "straight-time rate" assigned to certain hours of the day was not the rate actually paid but was "unrealistic and artificial." 323 U. S. at 42. Similarly, in *149 Madison Ave. Corp., v. Asselta, supra,* an attempt to allocate a weekly salary for a fixed number of hours into straight-time and overtime segments was held invalid. Although Mr. Justice Frankfurter in his concurring opinion in the *Youngerman-Reynolds* and *Harnischfeger* cases (325 U. S. at 426, 433-434) suggested that the plans in those cases might have been valid had the parties agreed that the excess of piece rate over hourly rate was to be allocated between straight time and overtime, the majority of the Court stated that "where the facts do not permit it, we cannot arbitrarily divide bonuses or piece work wages into regular and overtime segments, thereby creating an artificial compliance with Section 7 (a)." *Harnischfeger* case, 325 U. S. at 432.

In the same manner the circuit courts of appeals have consistently rejected attempts to translate rates of pay which were the same for non-overtime and overtime hours into other rates to avoid the payment of additional compensation for the overtime hours. *Castle v. Walling,* 153 F. (2d) 923 (C. C. A. 5); *Walling v. Alaska-Pacific Consolidated Mining Co.,* 152 F. (2d) 812 (C. C. A. 9) (daily wage); *Watkins v. Hudson Coal Co.,* 151 F. (2d) 311 (C. C. A. 3), certiorari denied 327 U. S. 777; *Seneca Coal & Coke Co. v. Lofton,* 136 F. (2d) 359 (C. C. A. 10), certiorari denied 320 U. S. 772; *Patsy Oil Co. v. Roberts,* 132 F. (2d) 826 (C. C. A. 10); *Walling v. Helmerich & Payne,* 138 F. (2d) 705 (C. C. A. 10) (weekly salary); *Walling v. Green Head Bit & Supply Co.,* 138 F. (2d) 453 (C. C. A. 10) (hourly rate).

All these decisions recognize that to permit a regular rate of pay to be redistributed after the event into straight-time and overtime is to permit a complete disregard of the statutory objective to increase the cost of hours after 40 by 50 percent. Under the plan in the instant case the cost of the employer was precisely the same whether the work was performed before or after 40 hours. This may be illustrated by the following example: Assume that it takes 600 man hours to produce 1,000 silicate carbon vitrified wheels. Under the unit production costs previously referred to of $0.936 per wheel, the employer will pay $936 as wages for 1,000 such wheels. If 15 men work 40 hours a week the employer will pay them $62.40.[9] If 10 men each work 60 hours a week, the employer will pay them each $93.60. By paying the same total of wages in each case, the employer in the second instance has defeated the purpose of the Act by employing fewer employees for longer hours, but he has incurred no overtime penalty even though his payroll records will show an overtime payment to the second group of employees.[10]

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[9] Appellee's plan is on a monthly not a weekly basis. To simplify our illustration, we show weekly rather than monthly figures. The mathematical principle, of course, is the same.

[10] The first group of employees would be paid as follows: 40 hours @ $0.90, the "hourly rate," or $36.00 advanced to each of the 15 employees, a total advance of $540. Balance to be distributed $936—$540=$396. This balance is divided among the 15 employees in proportion to their advanced earnings, $36.00/$540.00 or 1/15. Each employee gets 1/15 of $396 or $26.40. Total wage to each $36.00+$26.40=$62.40.

The second group would be paid as follows: 60 hours 40@ $0.90 and 20 "overtime" hours @ $1.35 or $63.00 advanced to each of 10 employees, a total advance of $630. Balance to be distributed, $936—$630=$306. This balance is divided among the 10 employees in proportion to their advanced earnings, $63.00/$630.00 or 1/10. Each employee gets 1/10 of $306 or $30.60. Total wage to each, $63.00+$30.60=$93.60.

Although the second example ostensibly includes overtime pay, the employer in each case is paying a total of $936 for 1,000 wheels.

That no overtime premium is being paid is also readily demonstrated by viewing the plant production as a whole. If we assume that the plant could produce 10,000 wheels a week if every employee worked 40 hours, each of those wheels cost the employer in wages $0.936, or a total wage bill in such a week of $9,360. If the employer wishes to increase his output he could work the employees over 40 hours, and continue to pay $0.936 per wheel, just as if no overtime were being worked. Thus the employees could work 48 hours (an increase of 8 hours or 20 percent) and the plant's output would go up to 12,000 wheels (an increase of 20 percent) and the labor cost would likewise go up 20 percent. But the purpose of the Act was to penalize the working of hours in excess of 40, so that the employer in a 48-hour week should pay time and one-half for the last 8 hours, or 52 hours' pay for 48 hours' work.

Although the plan creates the bookkeeping appearance of overtime payments, this is accomplished not by increasing the employer's labor costs for overtime, but by decreasing the employees' straight-time pay for non-overtime hours.

Respondent indeed concedes this effect of its plan, urging such allocation of total wages as proof of compliance. Thus in respondent's Exhibit 65 (R. 191) under column 15, respondent showed total wages for straight time hours worked for three months selected by respondent to be 21.31%, 21.37% and 20.7% respectively, of the production value of goods produced during such straight time hours. But it is undisputed that if no overtime had been worked during such months the total wages paid for the same straight-time hours would have been a greater amount, i.e. 24% of the production value of goods produced during such straight-time hours. This bookkeeping reduction of straight-time wages is necessitated solely by the fact

that overtime hours were actually paid for at the same rate as straight-time hours, i.e. 24% of the production value of goods produced. We submit that the arbitrary allocation of the total wage payment so computed without regard to whether or not overtime hours are worked into straight-time and overtime does not constitute compliance with the Act.

3. *Respondent's plan is not in the nature of a profit sharing plan.* The Circuit Court of Appeals, apparently sustained the validity of the plan herein, because it conceived its incentive features to be in the nature of a profit sharing plan, stating:

> "Rather its nature was that of a profit sharing plan. The profits to be so shared were the combined results of the efficient efforts of all employees, all departments, and the management. No individual employee received his additional compensation on the basis of what he individually did, or on the basis of his individual piece rate production" (R. ...).

Whether the measure of wages paid is the effort of the individual employee, or the group effort of all of the employees, or some standard having no connection with effort, is of no relevance to the case. We may assume that the purpose of the plan was to promote increased effort on the part of the production employees. Indeed, the Circuit Court of Appeals so concludes, referring in its opinion to the hourly rate plan in existence "before the production savings plan was proposed for the purpose of promoting incentive and increased efficiency among production employees."

But irrespective of the working of the plan in this respect, the plan provides a measure of the total compensation to be paid based on a fixed price for each unit pro-

duced. Such being the measure of compensation, we submit that the Act requires that units produced in overtime hours be paid for at one and one-half times the rate for units produced in straight-time hours.

On its face the plan is not in the nature of a profit-sharing plan, having no relation to "profits" and being based solely on production.

Nor does the plan herein provide for a "bonus" as that term is used in the Administrator's "bonus" releases (R. 26-34) and which are applicable to profit-sharing plans. In the situations described by the Administrator, a bonus or additional amount, determined *without regard to hourly rate payments,* is paid *in addition* to such hourly rates. In all of such cases the hourly rate remains significant in the determination of total wages. Under all "bonus" plans described by the Administrator the total labor cost of the employer and the wages received by the employee is actually greater for production in overtime hours.

But in the case at bar, the bonus, or bonus savings, is only the *subtraction* of the hourly rates previously advanced from the total amount agreed to be paid which is based on a fixed price per unit produced, and which is the same whether produced in straight-time or overtime hours.

In the case at bar the amount advanced on the hourly rates including overtime plus the so-called bonus always equals the same fixed price per unit produced, which is the same regardless of whether or not overtime hours are worked.

For the foregoing reasons, we submit that the Circuit Court of Appeals has herein decided an important question of federal law which has not been but should be settled by this Court. We further submit that the decision herein by the Circuit Court of Appeals is in conflict with the applicable decisions of this Court.

The precise plan involved herein has never, so far as we have been able to ascertain, been involved in any other case and is not in widespread use by employers.

However, if the decision of the Circuit Court of Appeals herein is approved, and held to be within the requirement of the Act it will undoubtedly be widely adopted, affording as it does a method whereby actual wages paid per unit produced remain constant without regard to whether or not overtime hours are worked.

CONCLUSION

Wherefore, we respectfully submit that this petition for a Writ of Certiorari to review the judgment of the Circuit Court of Appeals for the Sixth Circuit should be granted.

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July 21, 1948.

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1948
No. 173

HARVEY DEWATERS,
Petitioner,

v.

MACKLIN COMPANY, a Michigan Corporation,
Respondent.

On Petition For a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 50-60) are reported in 69 F. Supp. 262. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 204-213) is reported in 167 F. (2d) 694.

JURISDICTION

The judgment of the United States Circuit Court of Appeals was entered April 26, 1948. A copy of the petition

tor certiorari was served on Respondent's counsel on July 22, 1948. Petitioner avers that he invokes jurisdiction of this Court "under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925" (Petition, p. 2).

QUESTION INVOLVED

Petitioner's statement of the question presented is inaccurate because it assumes the facts to be otherwise than as found by both lower Courts. The question actually involved, and on which the Court below passed, can be stated as follows:

Was there a violation of Section 7 (a) of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, 29 U. S. C. 201-219) where, pursuant to explicit provisions of employment contracts, each employee received a specified hourly rate with time and a half for overtime, and in addition received (in those months when the total wages and overtime payments were less than a stipulated percentage of the employer's sales income allocable to that month's production) an additional payment which was arrived at by adding to the total earnings of each employee—both straight time and overtime, exclusive of the bonus—a predetermined percentge computed in accordance with a fixed formula, which resulted in each employee receiving one and one-half times as much compensation for each overtime hour as for each straight-time hour worked?

STATEMENT OF THE CASE

The statement of facts in the petition for certiorari is fragmentary, argumentative, contrary to the concurrent findings of both lower Courts, and, in our opinion, misleading.

III.

1. Petitioner's Contract of Employment

In final analysis, the case turns almost wholly on a simple question of fact: what was the employment contract of Petitioner? In an effort to bring the case within the doctrines previously laid down by this Court in such cases as *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427 (1945) and *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419 (1945), counsel for Petitioner asserted in the District Court (R. 42), and argued again in the Circuit Court of Appeals (see R. 208, 167 F (2d), 697), and now repeats in his petition for certiorari (p. 6) that Petitioner was paid on a group piece-work basis; and that his total weekly piece-work earnings must be divided by the number of hours worked during the week to determine his regular rate of pay.

However, this factual assertion has been rejected by both lower Courts. The District Court found specifically that Petitioner and all other hourly rated employees except guards were hired at "fixed hourly rates" (R 52). The Circuit Court of Appeals held: "the employees were not piece-rate workers and were not employed on a piece rate basis;" and declared: "we do not agree with appellant's contention that the addition of the incentive pay plan turned the contract into one on a piece-rate basis" (R 209, 167 F (2d), 697). Petitioner's statement disregards these findings, and asserts the fact to be that his contract of employment was on a piece-rate basis. His statements are contrary to the concurrent findings of both lower Courts on this factual question and are therefore not entitled to consideration here. [1]

[1] Typical instances, which we think illustrate the character of the application in this respect, include the following:

In attempting to make it appear that piece-rate payments were involved, it is said on page 4 of the petition that the "effect of this plan has been to fix the employer's wage costs at a predetermined amount

IV.

If the concurrent findings of both lower Courts on this question of fact are accepted (in accordance with the usual principles and, indeed, in accordance with evidence found uncontradicted by the Circuit Court—R. 209), the case presents no question that has not been previously determined in conformity with the results reached by the lower Courts here. Long standing administrative interpretations, reaffirmed by decisions of the Courts, fully support the conclusion of the Lower Courts in the instant case that (adopting the language of the Wage and Hour Division in Release A-13) no additional overtime compensation need be computed and paid on a bonus, the amount of which is in fact arrived at by taking a predetermined percentage of the total earnings of the individual employee (both straight time and overtime)[2] exclusive of

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for each unit of production", and similarly it is said on page 5 that "for each silicate carbon wheel produced, appellee pays in wages $0.936." These statements are not correct. The hourly wages paid employees for the production of certain items which were difficult to make would be substantially in excess of 24% of the sales price of such items. On other items, the wage cost per unit was substantially less than 24% of the sales price. The wage costs of producing silicate carbon wheels did not remain constant, but would vary each week, with variations in (a) the hours required to produce each wheel, (b) the amount of overtime worked in the pay period, (c) the bonus percentage paid with respect to that pay period. The only significance of 24% of the list price of any particular item was as one of the components in the computation of the amount of the bonus which was paid in *addition* to wages.

In furtherance of the same purpose, the payment of the hourly wages is described at page 5 of the petition as "wage advances", with the indication that it was merely a partial payment. But so to characterize the wage payments is to overrule the concurrent findings of fact of both lower Courts, and to repudiate the testimony of petitioner's own witnesses, who testified that their employment contract was for the paymen of hourly rates, not for the payment of piece rates. (R. 161, 162, 167, 158, 84).

The statement on p. 19 of the petition that payments made under Respondent's bonus plan were based solely on the employees' production cannot, we think, be reconciled with the findings of both lower Courts that the amounts payable were dependent upon the successful operation of the plant as a whole, reflecting such matters as efficiency of manufacturing processes (which were constantly being improved), the maintenance of a high volume of sales, efficient departmental planning, and the like.

[2] While we submit that even if the employment contract were for payment of piece rates, there would have been no violation of the Act, we suggest that this point need not be reached.

the bonus. In the instant case, the lower Courts merely applied this rule.

The employment contract of Petitioner[3] was as follows: he was hired eleven years prior to the date of the trial (R. 79) or in 1935. No bonus plan was in effect at the time he was hired, and during the first three years of his employment his total earnings were measured by his straight time hourly rate, which was increased from time to time. At all times since October, 1938, he received, in addition to his straight hourly rates, time and one-half for overtime; and, subsequent to the adoption of the income sharing plan here involved, he received in addition to his hourly rates and overtime (in months when the Company's sales income reached specified levels) a bonus which was computed by multiplying his gross earnings for the month (both straight time and overtime) by a percentage arrived at in accordance with a predetermined formula. Thus, for each straight time hour worked he received an hourly rate plus a bonus increment, and for each overtime hour worked he received one and one-half times his hourly rate plus one and one-half times the bonus increment. He received one and one-half times as much total compensation for each overtime hour as for each straight time hour. If, for example, the bonus percent was 20%, he received (during the period since 1942 when his hourly rate was 90c) $1.08 (90c plus 20% or 18c) for each straight time hour, and $1.62 ($1.35 plus 20% or 27c) for each overtime hour.

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[3] We do not agree that the decision here will control as to the remaining Plaintiffs, as stated in the Petition, for reasons that are not material here but among which are: (a) Respondent offered no evidence in the trial below, Plaintiff's case having been dismissed at the conclusion of Plaintiff's proofs; (b) the Portal-to-Portal Act having been enacted since the case was tried, additional defenses are available.

2. Respondent's Income Sharing Plan

Petitioner seeks in this action to penalize Respondent because the latter, motivated by purposes of generosity and in order to compenstate employees for losses of earnings during periods of curtailed production which result from the normally fluctuating character of Respondent's business (R. 52; 206), adopted in the autumn of 1938[4] an income sharings plan, which was designed to "supplement wages received from the fixed hourly rates" (R. 206, 167 F (2d), 696) and "to *add* to an *existing* wage structure of fixed hourly rate with time and a half for overtime, an additional incentive hourly premium rate" (District Court's findings, R. 58—italics supplied).

This is not a case where a bonus plan was devised as a substitute for the overtime standards of the Act, or as a means of evading or achieving painless compliance with the requirements of the Act. As the District Court found (R. 57, 58) Respondent's plan was "put into operation prior to the effective date of the Fair Labor Standards Act, not for the purpose of circumventing the Act or maintaining a status quo, but, in a realistic and mathematically workable manner, to *add to* an *existing* wage structure" (italics supplied). The plan by which this *addition* was made, the District Court further found, "is simple, and understandable, and divides the incentive wages into regular and overtime hourly segments in a realistic and mathematically workable manner" (R. 58). The Circuit Court

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[4] As noted both by the District Court (R. 51, 52) and the Circuit Court of Appeals (R. 205, 167 F (2d), 695), Respondent had over a period of years adopted voluntarily many plans for the economic benefit of its employees, including service awards, suggestion awards, Company-financed annuity and insurance programs, hospital and surgical benefit plans, co-operative bank savings plans, and other plans providing employee benefits.

of Appeals, concurred in these findings (R. 206, 167 F (2d), 696).

The plan operated as follows: (1) the company's total prospective sales income allocable to the month was computed by determining the total net sales price of all products entering the final inspection department during the month. (2) There would then be computed a certain percentage of the total sales income (the percentage varying at successive periods from 18% to 24%, but always bearing a close relation to the direct labor costs of production in preceding years—R. 206). (3) This stipulated percentage of the total sales income would then be compared with the total wages (straight time and overtime) previously paid to all employees participating in the plan. (4) If the total wages (including overtime) were less than the stipulated percentage of the total sales income, the difference constituted the bonus fund which was distributed to the employees as additional compensation. (5) This additional compensation was distributed as follows: the bonus fund was translated to a percentage figure, representing the proportion which the bonus fund bore to the total wages, including overtime (the percentage being obtained by dividing the bonus fund by the total actual labor costs, including both straight time and overtime); and each employee's total monthly straight time pay and overtime pay was increased by this percentage.[5]

For example, in the month of February, 1945, as shown by Exhibit 92 (R. 201) the computation was as follows: (1) The total prospective sales income was $372,946.86. (2) The stipulated percentage, 24% thereof, therefore equalled $89,507.25. (3) The total wages (both straight time and overtime) for the month were $78,024.88. (4)

[5] The details of the computation are well set forth in the opinion of the Circuit Court of Appeals, (R. 206, 167 F (2d), 696).

The total wages being $11,482.37 less than 24% of the sales income, this difference constituted the bonus fund. (5) Dividing $11,482.37 (the bonus fund) by $78,024.88 (total wages, straight time and overtime) produced a percentage figure of 14.7%; and accordingly, each employee's total monthly pay was increased by that percentage. If an employee had worked 160 straight time hours at 90c to earn $144 in straight time wages and had worked 30 overtime hours at $1.35 to earn $40.50 in overtime wages, he would receive a bonus of $27.12 (21.17 or 14.7% of $144 straight time pay plus $5.95 or 14.7% of $40.50 overtime pay).

Both Lower Courts held that Petitioner's "regular rate" comprised his hourly rate plus the percentage increment. If they were correct in so holding, there can be no question but that Petitioner was paid one and one-half times his "regular rate" of pay for each overtime hour. But Petitioner urges that the bonus percentage which was added to his *overtime* earnings must be allocated solely to straight time earnings, and his "regular rate" accordingly increased. It is Petitioner's position that although the employment contract specifically allocated one share of the bonus for each straight time hour worked and one and one-half shares of the bonus for each overtime hour worked,[6] and even though an employee participated in that part of the bonus fund contractually allocated to overtime compensation only if the employee had previously worked more than a specified number of hours during the workweek, nevertheless the entire bonus fund must be allocated exclusively to straight time compensation. This position was found untenable by the Circuit Court, which held "Ap-

[6] With the result that "the compensation paid to the employee contains some amount that represents an overtime premium."—*Bay Ridge Operating Co.* v. *Aaron*, —— U.S. ——, No. 366, October 1947 term, (slip opinion, p. 16).

pellants error consists in attempting to treat *all* of the production savings as being paid for regular non-overtime work, although the plan, by contract, provides otherwise" (R. 210).

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In the

SUPREME COURT OF THE UNITED STATES

No. 173

October Term, 1948

HARVEY DEWATERS,

Petitioner,

v.

MACKLIN COMPANY, *a Michigan Corporation,*

Respondent.

ARGUMENT

Petitioner suggests two grounds for the allowance of the writ: (1) that the Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court; (2) that the decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court. We reply to these two points *seriatim*.

1. There is Not Involved Any Important Question of Federal Law Which Should Be Settled.

There has never been any question (it having been so ruled by the Wage and Hour Division in a long series

of interpretative bulletins[7] and it being conceded, indeed, by Petitioner at page 19 of his petition) that where an employee is paid at an hourly rate, and thereafter a bonus is paid on the basis of a predetermined percentage of his total earnings (both straight time and overtime) exclusive of the bonus, there exists full compliance with the Act. The question which Petitioner seeks to interject into the case could not arise unless the employees were paid on a piece-rate basis. He assumes, throughout his petition, that Petitioner was so paid. But, as we have pointed out *supra,* the uncontradicted evidence makes it clear that Petitioner was not employed on a piece-rate basis. The findings of both Lower Courts, specifically rejecting this contention of Petitioner, rested on the testimony of employee witnesses that they were paid hourly rates (R. 84, 158, 162, 167), on the hiring cards (Ex. 66, R. 192), employment records (Ex. 6, R. 193), and payroll records (Ex. 66 R. 195) of the employer; on the fact that the productive efforts of the employees were not controlling in determining the amount of the bonus distribution (R. 56), and on other like conclusive evidence.

Petitioner's argument, though ingeniously contrived, is woven on a web of false premises. If the employees were

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[7] See Release R-1548 (a), dated September 2, 1941; stating that where a bonus is distributed in an amount which varies according to the "sales income" of the employer and where a bonus is paid at the rate of X percent of the employee's straight time earnings and X percent of his overtime earnings, the payments "satisfy in full the overtime provisions of the Act." To the same effect see Release A-13, dated February 5, 1945, and also the opinion letter of the Wage and Hour Division, dated August 16, 1946. These comprise the principal published statements of the Wage and Hour Division asserting that where a bonus is paid on the basis of a predetermined percentage of an employee's gross hourly earnings (including both straight time and overtime) the requirements of the Act have been satisfied. Specific advice to the same effect was given Appellee in a letter from the Regional Attorney of the Wage and Hour Division, dated December 13, 1941, Ex. 88 (R. 197) wherein the Wage and Hour Division advised Appellee that "upon the facts which you present in your inquiry" and "from a careful study of the problem set forth in your letter" it was the opinion of the Wage and Hour Division that Appellee's "method of pro-rating the production savings over your total payroll is in conformity with our interpretation of the requirement of the Act."

in fact hired on a group piece-rate basis—if the employment contract in fact were that the employees would be paid as straight time compensation 24% of the dollar value of the goods they produced—then a question might arise as to whether the parties could provide by agreement that a certain segment of the group piece-work earnings would be allocated exclusively to overtime compensation.

But the ready answer is that the contract of employment was not as Petitioner represents it. Both Lower Courts found that the terms of the employment contract were that Petitioner was paid an hourly rate. These concurrent findings as to the terms of the employment contract are indubitably findings of fact; and it is not appropriate that certiorari issue for the purpose of requiring this Court to redetermine from the evidence this factual question.

Even if it were supposed that certiorari might issue for the purpose of reviewing the hypothetical question which Petitioner presents—whether, *if* a contract of employment provided for the payment of piece rates, the parties could legally agree that a certain portion of the total earnings of the entire group of employees should be allocated to the purpose of paying extra compensation to those who worked overtime—still we submit that the allowance of the writ would be inappropriate because such hypothetical question is not an important one. Certainly, that question has no proper place in the disposition of this case. Nor has Petitioner made any showing that such question would be involved in any employment contract in effect anywhere. Indeed, Petitioner concedes (p. 20) that he knows of no case involving such a plan.[8]

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[8] However, it appears that in two cases—*Walling* v. *Garlock Packing Company* (C. C. A. 3, 1947) 159 F (2d) 44 and *McComb* v. *Utica Knitting Company* (C. C. A. 2, 1947) 164 F (2d) 670—a bonus paid in substantially the same method as that here involved was held or assumed to be in compliance with the law. The District Court's opinion in the latter case pointed out that no claim was made that any violation of the Act was involved in the payment of the bonus.

Decision in the lower Court herein was rested largely on the Court's finding (which limits the effect of the decision to the particular and somewhat unusual circumstances here involved) that the bonus was something added to a pre-existing bona fide hourly rate structure (R. 211). The Court did not lay down any broad principles of general application. Rather, its opinion reviewed carefully all the Supreme Court decisions cited by the Petitioner, pointing out the factual differences between the cases relied on by Petitioner and the instant case, and further pointing out that the holdings in a long line of Supreme Court cases necessitated, under the Court's findings as to the particular factual situation here involved, the conclusion that there had been no violation of the Act.

There is no basis at all for assuming that to leave the decision of the Circuit Court of Appeals in effect, without re-examination here, would lead other employers to adopt the same plan. The particular factual circumstances which the lower Courts here found to be controlling would in all probability not be duplicated in any other plant wherein a somewhat similar plan might be inaugurated. Further, we respectfully suggest that the Court need not concern itself with this fear, because if other employers did adopt similar plans, their employees would be the beneficiaries, for it is readily demonstrable that the plan here involved was far more liberal, and resulted in greater payments to employees, than obtain under most plans for the distribution of a share of an employer's income or profits among the employees. Certainly, the adoption of this plan by Respondent increased its total labor costs by far more than is required under the "time and a half for overtime" requirement of the Act.

2. The Decision Below is Not in Conflict With Applicable Decisions of this Court.

The petition repeats—for the most part in identical language—all of the arguments as to the merits of the case which were urged before the Circuit Court of Appeals. We think Petitioner overlooks the admonition of Chief Justice Taft, speaking for the Court in *Magnum Import Co. Inc.* v. *Coty*, 262 U. S. 159, 163 (1923), that "The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." We do not conceive it appropriate to incorporate, in this memorandum opposing the application for certiorari, Respondent's answers to these various arguments, as they were set forth in Respondent's briefs below. We think that the opinion of the Circuit Court of Appeals amply answers all these arguments (and demonstrates that its decision is not in conflict with but is on the contrary entirely supported by prior decisions of this Court.

We do not undertake to reply in detail to Petitioner's argument on the merits. However, we think it appropriate to point out that his entire argument is based on the assumption that a violation of the Act can be premised on the method by which the amount of the bonus fund is determined. But this assumption is erroneous.

The Act does not lay down any mandate as to the method by which to determine the amount of the bonus fund, where, as here, the bonus is added to a *bona fide* hourly rate; The Act is concerned only with the method by which the bonus fund, once determined, is distributed. If the bonus be deemed a part of the "regular rate" of pay, then, under the Act, it must be so distributed that each employee reecives once and one half as much for

each overtime hour as for each straight time hour. But the method of determining the amount of the bonus fund is not affected by the Act. The employer may pay no bonus. If he chooses to pay one, he can determine the amount of the bonus fund by any method which strikes his fancy. The amount of the bonus fund could, with perfect legality, be determined by pure chance—on the basis of published bank clearings, United States Treasury balances, stock exchange sales, or some other method quite unrelated to the employer's operations. Or it could be based on production, or on profits, or on cost-of-living indices. As the Administrator has pointed out in published releases and interpretations, there are innumerable methods of arriving at a bonus fund; and with these, the Act is not concerned. It is only after the amount of the bonus fund is determined that the Act limits the employer's freedom of choice. It prescribes the method of distributing the bonus fund. But here, since one share of the bonus fund was paid for each straight time hour worked, and one-and-one-half shares for each overtime hour worked (with appropriate differentials for differences in hourly rates) it is conceded that the method of distributing the bonus fund was in compliance with the requirements of the Act. In the cases cited by Petitioner, *per contra,* the method of distribution did not meet this test.

Insisting throughout his application (despite the adverse findings of both lower Courts on this factual question, and despite the uncontradicted evidence in support of such findings) that he was employed on a piece-rate basis, Petitioner rests his argument almost entirely on the decisions in *Walling* v. *Harnischfeger Corp.,* 325 U. S. 427 (1945) and *Walling* v. *Youngerman-Reynolds Hardwood Company,* 325 U. S. 419 (1945). These cases are referred to on nearly every page of his petition. The as-

serted conflict between the decision below and prior decisions of this Court rests entirely on the argument that those two cases are controlling here. We think, therefore, that to point out the vast differences between those cases and the case at bar effectively disposes of the argument that the decision below is in conflict with applicable decisions of this Court.

Adopting the language previously used by this Court (in *Walling* v. *Halliburton Co.*, 331 U. S. 17, 24-1947) to summarize its decisions in the *Harnischfeger* and *Youngerman-Reynolds* cases, the employment contracts in both those cases:

> "established two alternative methods for computing each employee's wages. One was to multiply his straight-time hours of work by a specified basic hourly rate, and his overtime hours by one and one-half that rate, and add the products. The other method was to multiply the number of jobs done by a specified piece-work rate. The employee was entitled to be paid the greater of these two sums."

But actually, on the facts of those two cases, as this Court pointed out, the piece work rates were determinative of the wage to be paid. In other words, those cases involved piece-rate workers; and did not involve any income-sharing bonus plan. The employees in those cases actually received only their straight time piece-work rates, without any additional compensation for overtime. They did not receive once and one-half as much compensation for each overtime hour as for each straight-time hour. In the instant case, on the other hand, the employees were not paid on piece rates, and they *did* receive once and one half as much compensation for each overtime hour as for each straight-time hour.

The opinion of the Circuit Court of Appeals discussed this distinction fully (167 F (2d) 697-699). It pointed out that the rulings in the Harnischfeger and Youngerman-Reynolds cases:

> "are based essentially upon the fact that the employee was *actually* compensated upon a piece rate basis and that the amount received by reason of the piece-rate basis during the regular workweek was the regular pay rather than the amount received by application of the hourly rate basis specified in the contract;" (R. 208-209)

and after pointing out that:

> "In the present case the employees were not piece-rate workers and were not employed on a piece-rate basis," (R. 209)

the Court below said that:

> "The contractual rates which were held invalid by the Supreme Court in the cases relied on by appellant were not established in a bona fide manner; they were held invalid because of their wholly unrealistic and artificial nature"; (R. 211).

and the Court below then pointed out that in the instant case:

> "The contract of employment contained a *bona fide hourly rate.*" (R. 211).

The correctness of the Circuit Court of Appeal's analysis of the rulings in the *Harnischfeger* and *Youngerman-Reynolds* cases is indicated by the fact that only a few weeks ago this Court in *Bay Ridge Operating Co., Inc.* v. *Aaron* (June 7, 1948, No. 366, October 1947 term, slip opinion, page 24) declared in footnote 29 that the statements made by the Court in those cases were

> "made as to a situation where this Court concluded the dual pay plan of the case was 'wholly unrealistic and artificial * * * so as to negate the statutory purposes.' "

Again, we recur to the same point previously made: in the instant case, the fundamental inquiry is a factual one: What was Petitioner's contract of employment? Was his contractually specified hourly rate a *bona fide* rate, or was it a mere artifice? These questions of fact are resolved adversely to Petitioner's contentions by the concurrent findings of both lower Courts. Their findings that the contractually specified hourly rate was *bona fide,* and not a mere artifice, rested on the lower Courts' appraisal of the somewhat unusual factual situation involved in this particular case, and particularly on the fact that the hourly rate structure had long been in effect before the bonus was introduced as an addition thereto. This serves to demonstrate that the hourly wage rates were in no sense an artifice. The concurrent findings of the lower Courts on this question should be accepted. If accepted, it disposes of the case.

Indeed, the whole question as to conflict between the decision below and applicable decisions of this Court may be laid at rest upon further examination of the holding of this Court in June, 1948, in the *Bay Ridge* case. In that case the Court declared (p. 16, slip opinion)

> "Congress intended the regular rate of pay to be found by dividing the weekly compensation by the hours worked unless the compensation paid to the employee contains some amount that reprerents an overtime premium. If such overtime premium is included in the weekly pay check that must be deducted before the division."

In the instant case, it is undisputed that each employee received one share of the bonus fund for each straight time hour worked and one and a half shares of the bonus fund for eacth overtime hour worked. Those shares of the bonus fund allocated by the employment contract to payment of overtime premiums went only to those employees who had worked in excess of 40 hours during the workweek. They were clearly "true overtime premiums", within the test laid down by this Court in that case, defining true overtime premiums as "extra pay for work because of previous work for a specified number of hours in the workweek." (Slip opinion, p. 2).

Therefore, the overtime shares of the bonus fund, received by those employees who worked overtime (and only by those employees) must be deducted from each employee's total weekly compensation before computing his statutory "regular rate." That is exactly what Respondent did, and what the Court below held proper. Petitioner insists that these overtime shares of the bonus fund must be allocated exclusively to his straight time earnings, and made a part of the base on which his statutory "regular rate" is to be computed. But in the *Bay Ridge* case, this Court held that this must be done, declaring (slip opinion, pp. 17, 18):

> "When the statute says that the employee shall receive for his excess hours one and one-half times the regular rate at which he is employed, it is clear to us that Congress intended to exclude overtime premium payments from the computation of the regular rate of pay. To permit overtime premium to enter into the computation of the regular rate would be to allow overtime premium on overtime premium—a pyramiding that Congress could not have intended.

* * *

"Otherwise the purpose of the statute to require payment to an employee for excess hours is expanded extravagantly by computing regular rate of pay upon a payment already made for the same purpose for which § 7 (a) requires extra pay, to wit, extra pay because of excess working hours. Accordingly, statutory excess compensation paid for work in excess of forty hours should not be used to figure the regular rate. Neither should similar contract excess compensation for work because of prior work be used in such a calculation. Extra pay by contract because of longer hours than the standard fixed by the contract for the day or week has the same purpose as statutory excess compensation and must likewise be excluded."

The decision in the Court below is entirely consistent with, and would seem to be required by, the pronouncement of this Court in the *Bay Ridge* case.

CONCLUSION

This case involves primarily a question of fact: what were the terms of Petitioner's contract of employment?

The petition is based upon a complete disregard of the concurrent findings of both lower Courts on this factual question. It asks this Court to reverse these findings of fact, to ascertain that Petitioner was employed on a piece-rate basis, and then decide a question which is not actually involved in this case.

It is therefore urged that the petition for a writ of certiorari should be denied.

Respectfully submitted,
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